

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATIONS FOR)
TRANSFER NO. 5174 IN THE NAME OF)
DENNIS M. BAKER AND NO. 5175 IN)
THE NAME OF HUF-N-PUF TRUST)
_____)

FINAL ORDER

On August 4, 1998, the hearing officer for the Idaho Department of Water Resources (the "Department") issued a Recommended Order in connection with the above captioned matter. On August 21, 1998, Huf-N-Puf Trust filed Exceptions to Recommended Order and a supporting brief with the Director of the Department. On August 24, 1998, Dennis M. Baker ("Baker") filed a Joinder in Exceptions to Recommended Order adopting by reference the Exceptions to Recommended Order filed by Huf-N-Puf Trust. On August 27, 1998, the Blaine County Commissioners filed a Response to Applicants' Exceptions to Recommended Order and Brief Opposing Exceptions and Supporting Order. On August 28, 1998, the Idaho Conservation League and Idaho Rivers United filed Intervenor's Response to Applicants' Exceptions to Recommended Order. The Director has reviewed the exceptions, supporting briefs, and responses to the exceptions and briefs, and responds as follows:

1. Finding of Fact No. 14. Huf-N-Puf Trust and Baker take exception to the description of the testimony of the expert witness for the applicants in Finding of Fact No. 14. The amount of water sought for transfer on each application for transfer is 0.09 cfs. Based on a number of assumptions, the expert witness for the applicants testified that each proposed diversion of groundwater at a rate of 0.09 cfs would cause a maximum, instantaneous depletion in the flow of the Big Wood River estimated to be about 0.02 cfs, or an annual depletion estimated to be about 5 acre-feet. Finding of Fact No. 14 in the Recommended Order recognizes the depletion in flow as small, difficult to measure, but real. Even if the maximum instantaneous depletion would not exceed 0.02 cfs and could not be measured using conventional methods, the hearing officer correctly concluded that such depletion would be "real". Finding of Fact No. 14 in this Final Order is revised to clarify the description of the testimony of the expert witness for the applicants. However, the finding that granting either transfer would result in a real depletion in the flow of the Big Wood River is not changed.
2. Finding of Fact No. 17. Huf-N-Puf Trust and Baker take exception to not including a description of the testimony of the expert witness for the applicants that the Big Wood River loses water to the adjoining aquifer in

the reach of the river adjacent to the proposed points of diversion and places of use. The exception contends that the expert witness for the protestants did not disagree with the testimony of the applicant's expert witness. While the expert witness for the applicants did testify that the reach of the Big Wood River adjacent to the proposed points of diversion and places of use is a losing reach, and the expert witness for the protestants did not disagree with this testimony, the applicants' expert witness testified that the aquifer adjacent to this reach of the Big Wood River was hydraulically connected to the river. During a portion of the hearing on April 8, 1998, the expert witness for the applicants testified that either transfer would cause a maximum, instantaneous depletion in the flows of the Big Wood River estimated to be 0.02 cfs at Hailey, Idaho. Withdrawal of water from the aquifer adjacent to the Big Wood River would not cause depletion in the flows of the Big Wood River unless the river and the adjacent aquifer are hydraulically connected. The expert witness for the protestants also testified that the aquifer adjacent to the Big Wood River near the point of diversion proposed by Huf-N-Puf Trust is hydraulically connected to the river. He testified that the proposed transfers would reduce flows in the Big Wood River whether or not this reach of the river is a losing reach. Finding of Fact No. 17 in this Final Order has been revised to more fully reflect the testimony of the experts for the applicants and protestants on this issue.

3. Exceptions to Analysis.

- a. Sixth Paragraph (now in the fifth paragraph) - Huf-N-Puf Trust and Baker take exception to the reference to the combined rate of diversion of 0.18 cfs in comparison to the rate of flow of the Big Wood River. The paragraph has been revised to clarify the description of the estimated reductions to flows in the Big Wood River if the transfers are approved.
- b. Sixth Paragraph - Huf-N-Puf Trust and Baker take exception to including the theoretical maximum consumptive use that could occur if the transfers are approved. The expert witness for the applicants testified that each application would result in an annual depletion of about 5 acre-feet of water, 10 acre-feet when combined, based on irrigating vegetation having low water consumption requirements. However, if the proposed transfers are approved, the water rights would not be limited for use in irrigating vegetation having low water consumption requirements. The two applications for transfer, when combined, propose to divert a maximum volume of water of 35 acre-feet annually. This volume of water is theoretically sufficient for irrigating vegetation

having high water consumption requirements near Ketchum, Idaho. If the two applications for transfer are approved as submitted, the annual volume of water depleted from the Big Wood River, and unavailable to satisfy senior water rights, could total nearly 25 acre-feet. This volume of water is not insignificant.

- c. Seventh Paragraph - Huf-N-Puf Trust and Baker contend that this paragraph treats the proposed transfers as the equivalent of applications for new water rights. This paragraph describes the physical effect the transfers would have as being equal to the physical effect new appropriations of equal amounts of water would have on the amount of water available to senior water rights during times of scarcity. However, the basis for denying the proposed transfers is injury to other water rights in accordance with Section 42-222, Idaho Code.
4. Conclusion of Law No. 8. Huf-N-Puf Trust and Baker contend that Conclusion of Law No. 8 “improperly applies Idaho law which permits transfers of water rights unless there is substantial or material injury to other water rights.” Section 42-222, Idaho Code, does not describe injury in terms of “substantial or material.” Rather, the word “injured” is used without modifiers or qualification. Huf-N-Puf Trust and Baker argue that for another water right to be “injured” under Section 42-222, Idaho Code, that water right must be substantially injured. In *Beecher v. Cassia Creek Irrigation Company*, 66 Idaho 1, 7, 154 P.2d 507 (1944), the Idaho Supreme Court defined “substantially injured” as “not merely a fanciful injury but a real and actual injury.” The proposed transfers would cause real depletions to the flows in the Big Wood River during times of water shortages when senior water rights are curtailed. Allowing groundwater to be pumped under a junior priority from an adjacent aquifer hydraulically connected to the Big Wood River during times when downstream senior water rights from the Big Wood River are curtailed would cause “real and actual injury” which is determinable and would be wholly inconsistent with Idaho law. The conclusion of law is not changed.
5. Conclusion of Law No. 9. Huf-N-Puf Trust and Baker similarly contend that Conclusion of Law No. 9 “improperly applies Idaho law.” Conclusions of Law No. 8 and No. 9 are changed to clarify that approval of the applications for transfer would injure existing water rights in the Big Wood River upstream from Magic Reservoir.

Based upon his understanding of the law and the facts in this matter, the Director makes the following Findings of Fact, Conclusions of Law and Final Order:

FINDINGS OF FACT

1. On January 21, 1986, the Department issued License No. 37-07745 ("license") in the name of Connecticut General Life Insurance Company that provided the following:

Source:	Groundwater
Priority:	October 25, 1978
Rate of diversion:	5.53 cubic feet per second ("cfs")
Point of diversion:	Section 1, T2S, R17E, B.M.
Use:	Irrigation
Season of use:	April 1 to November 1
Place of use:	300 acres in Section 2, T2S, R17E, B.M., and Section 35, T1S, R17E, B.M.

2. On July 21, 1994, the Glen Croft Estate filed an Application for Extension of Time to Avoid Forfeiture of a Water Right in connection with the license, describing that the water was last used in October of 1990. The Department advertised the application for extension of time, and the application was not protested. On October 5, 1994, the Department granted the extension of time to avoid forfeiture requiring that use of the water right be resumed on or before October 1, 1999.

3. On October 26, 1995, the Department approved amended Transfer No. 4708, in the name of Peter and Melissa Delisser, authorizing a change in the place of use and point of diversion for part of License No. 37-07745. The amount of water transferred is 0.18 cfs for the irrigation of 10 acres. The new place of use is located near Bellevue, Idaho in the SWNE Section 2, T1N, R18E, B.M., approximately 12 miles north of the original site. The new place of use is downstream from reaches of the Big Wood River having water rights for minimum stream flows. In approving the transfer, the Director maintained jurisdiction of the transfer for up to five years to determine potential injury to existing rights near the new place of diversion.

4. On October 26, 1995, the Department also approved amended Transfer No. 4702 in the name of Dennis M. Baker, authorizing a change in the place of use and point of diversion for another part of License No. 37-07745. The amount of water transferred is 3.68 cfs for the irrigation of 200 acres in Section 16, T1S, R17E, B.M. The new place of use is located near Magic Reservoir in the Camas Creek drainage approximately 4 miles northwest of the original place of use. In approving the transfer, the Director of the Department maintained jurisdiction of the transfer for up to five years to determine potential injury to existing rights near the new point of diversion.

5. Additionally on October 26, 1995, the Department approved amended Transfer No. 4707 in the name of Steve and Kate Duinick, authorizing a change in the place of use and point of diversion for the remaining part of License No. 37-07745. The remaining amount of water transferred is 1.67 cfs for the irrigation of 90 acres. The new place of use is located in Section 35, T2N, R18E, B.M., and Section 2, T1N, R18E, B.M., near Bellevue, Idaho.

approximately 12 miles north of the original place of use. The new place of use is downstream from reaches of the Big Wood River having water rights for minimum stream flows. The Director also maintained jurisdiction of this transfer for up to five years to determine potential injury to existing rights near the new point of diversion.

6. The Department has issued water right licenses to the Idaho Water Resource Board establishing minimum stream flows on the Big Wood River as follows:

License No:	37-07919
Source:	Big Wood River
Priority:	June 19, 1981
Rate:	70 cfs
Beginning point of reach:	SEnw Section 13, T4N, R17E, B.M.
Ending point of reach:	SWNW Section 36, T2N, R18E, B.M.
Use:	Minimum stream flow
Season of use:	Year-round
Place of use:	Within the reach
Remarks:	This reach extends from the confluence of the Big Wood River with Warm Springs Creek, near Ketchum, Idaho, downstream approximately 18 miles to the heading of the Bellevue Canal near Bellevue, Idaho.

License No:	37-08258
Source:	Big Wood River
Priority:	January 16, 1986
Rate:	200 cfs from March 1 to August 31 150 cfs from September 1 to February 29
Beginning point of reach:	SEnw Section 10, T5N, R17E, B.M.
Ending point of reach:	SEnw Section 13, T4N, R17E, B.M.
Use:	Minimum stream flow
Place of use:	Within the reach
Remarks:	This reach extends from the intersection of the Big Wood River with the boundary of the Sawtooth National Recreation Area downstream approximately 9 miles to the confluence of the Big Wood River with Warm Springs Creek near Ketchum, Idaho.

License No:	37-08307
Source:	Big Wood River
Priority:	October 16, 1987
Rate:	119 cfs
Beginning point of reach:	SEnw Section 13, T4N, R17E, B.M.
Ending point of reach:	SWNW Section 36, T2N, R18E, B.M.
Use:	Minimum stream flow

Season of use:	Year-round
Place of use:	Within the reach
Remarks:	This reach extends from the confluence of the Big Wood River with Warm Springs Creek, near Ketchum, Idaho, downstream approximately 18 miles to the heading of the Bellevue Canal near Bellevue, Idaho.

7. On October 20, 1997, Dennis M. Baker ("Baker" or "applicant") filed Application for Transfer No. 5174 ("Baker Application") with the Department seeking to change the point of diversion and the place of use for a portion of the license previously transferred under Transfer No. 4702 as follows:

License No:	37-07745 (part)
Source:	Groundwater
Priority:	October 25, 1978
Rate of diversion:	0.09 cfs
Point of diversion:	NWSE Section 1, T4N, R17E, B.M.
Use:	Irrigation for 5 acres
Season of use:	April 1 to November 1
Place of use:	NWSE Section 1, T4N, R17E, B.M.
Remarks:	The place of use is also known as lots 6 and 7, Block 1, of the Bigwood P.U.D. Subdivision

The Baker Application proposes to change the diversion of water for irrigation from groundwater underlying the Camas Creek drainage area, for use on lands in the Camas Creek drainage, to groundwater from the aquifer adjoining the Big Wood River, for use on lands adjacent to the Big Wood River, near Ketchum, Idaho. The proposed point of diversion and place of use are located approximately 30 miles north of the place of use in T1S, R17E, B.M., previously authorized by Transfer No. 4702. The new point of diversion would be from groundwater adjoining the reach of the Big Wood River for which a minimum stream flow was established under License No. 37-08258 at a location approximately 2 miles upstream from the lower end of that reach. The proposed point of diversion and place of use are also upstream from the reaches of the Big Wood River for which minimum stream flows were established under License Nos. 37-07919 and 37-08307.

8. On October 27, 1997, Huf-N-Puf Trust ("Huf-N-Puf" or "applicant") filed Application for Transfer No. 5175 ("Huf-N-Puf Application") with the Department seeking to change the point of diversion and the place of use for another portion of the license previously transferred under Transfer No. 4702 as follows:

License No:	37-07745 (part)
Source:	Groundwater
Priority:	October 25, 1978
Rate of diversion:	0.09 cfs

Point of diversion:	SENW Section 1, T4N, R17E, B.M.
Use:	Irrigation for 5 acres
Season of use:	April 1 to November 1
Place of use:	SENW Section 1, T4N, R17E, B.M.
Remarks:	The place of use is also known as Lots 6, 7, and 8 of the Flowers Mill Subdivision.

Like the Baker Application, the Huf-N-Puf Application proposes to change the diversion of water for irrigation from groundwater underlying the Camas Creek drainage area, for use on lands in the Camas Creek drainage, to groundwater from the aquifer adjoining the Big Wood River, for use on lands adjacent to the Big Wood River, near Ketchum, Idaho. The proposed point of diversion and place of use are located approximately 30 miles north of the place of use in T1S, R17E, B.M., previously authorized by Transfer No. 4702. The new point of diversion would be from groundwater adjoining the reach of the Big Wood River for which a minimum stream flow was established under License No. 37-08258. The proposed point of diversion and place of use are also upstream from the reaches of the Big Wood River for which minimum stream flows were established as described in License Nos. 37-07919 and 37-08307.

9. The Department published notice of the applications filed by Baker and Huf-N-Puf, which were subsequently protested by the Blaine County Commissioners ("Blaine County" or "county" or "protestant"). The Department also granted a petition to intervene that was received from Idaho Rivers United and the Idaho Conservation League ("intervenor").

10. On April 8 and 9, 1998, and on May 19 and 20, 1998, the Department conducted a hearing on the protested applications for transfer in Hailey, Idaho. Applicant Huf-N-Puf was represented by James P. Speck, and applicant Baker was represented by Gary D. Slette. Blaine County was represented by James L. Kennedy. Laird J. Lucas and Deborah Hiller represented intervenors Idaho Rivers United and the Idaho Conservation League.

11. Issues identified by the protestant and intervenors include the following:

- a. the proposed changes will injure other water rights;
- b. the proposed changes are not in the local public interest;
- c. the proposed changes will enlarge the use of the original right; and
- d. the proposed changes are not consistent with the conservation of water resources within the state of Idaho

12. Exhibits offered and accepted as a part of the record include the following:

- a. Applicant's Exhibit 1 - HUF-N-PUF Trust (ADF Project #96006) dated January 29, 1998

- b. Applicant's Exhibit 2 - Thomas R. Monge, Resume - Qualifications
- c. Applicant's Exhibit 3 - Letter dated April 1, 1998, to Mrs. Teresa Heinz from Mary Austin Crofts
- d. Applicant's Exhibit 4 - Inter-Department Memo dated August 9, 1994, from Jim Stanton to Sawtooth Sheep Co., Transfer Application
- e. Applicant's Exhibit 5 - Inter-Department Memo from Jim Stanton to Croft, Ext. Of Time to Avoid Forfeiture
- f. Applicant's Exhibit 6 - Letter dated October 7, 1994, to Glen Croft Estate or Jane Croft from Julie L. Yarbrough
- g. Applicant's Exhibit 7 - NOT OFFERED
- h. Applicant's Exhibit 8 - NOT OFFERED
- i. Applicant's Exhibit 9 - NOT OFFERED
- j. Applicant's Exhibit 10 - IDAPA 37.03.11 (Conjunctive Management Rules)
- k. Protestant's Exhibit A - Judicial Notice Request
- l. Protestant's Exhibit B
 - Notice of Proposed Change of Water Right No. 5174 and County Warrant
 - Notice of protest
 - Letter dated December 22, 1997, to Allen Merritt from Blaine County Commission
 - Letter dated February 9, 1998, to Allen Merritt from Len Harlig, Mary Ann Mix, and Dennis Wright
 - Notice of Proposed Change of Water Right No. 5175 and County Warrant
 - Notice of Protest signed December 23, 1997

- Letter dated December 22, 1997, to Allen Merritt from Blaine County Commission
 - Letter dated February 9, 1998, to Allen Merritt from Len Harlig, Mary Ann Mix, and Dennis Wright
- m. Protestant's Exhibit C - Letter dated October 23, 1997, to Allen Merritt from Len Harlig, Mary Ann Mix, and Dennis Wright
 - n. Protestant's Exhibit D - Comprehensive Plan, Blaine County, Idaho, dated November 7, 1994
 - o. Protestant's Exhibit E - Blaine County Resolution 98-1 dated January 26, 1998, Adopting a Blaine County Local Public Interest Water Policy
 - p. Protestant's Exhibit F - Resume - Keith L. Anderson
 - q. Protestant's Exhibit G - Memorandum dated February 1, 1980, to Regional Offices and Water Allocation Section from Dave Tuthill; and memorandum dated January 22, 1980, to staff from C. Stephen Allred
 - r. Protestant's Exhibit H - Order of IDWR titled "In the Matter of Designating the Big Wood River Ground Water Management Area" and "Management Policy for the Big Wood River Ground Water Management Area" both dated June 28, 1991
 - s. Protestant's Exhibit I - Application for Extension of Time to Avoid Forfeiture of a Water Right filed in the name of Glen Croft Estate or Jane Croft
 - t. Protestant's Exhibit J - BLM map showing the vicinity of Ketchum, Idaho
 - u. Protestant's Exhibit K - Priority Cuts on the Big Wood River above Magic Reservoir for years 1992 through 1996
 - v. Protestant's Exhibit L - Letter dated December 22, 1997, to Board of County Commissioners from Norman C. Young
 - w. Protestant's Exhibit M - NOT OFFERED
 - x. Protestant's Exhibit N - NOT OFFERED
 - y. Protestant's Exhibit O - NOT OFFERED

- z. Protestant's Exhibit P - Work Sheet - Work sheet titled "Depletion of Big Wood River Flows Resulting From Pumping Wells North of Ketchum"
- aa. Protestant's Exhibit Q - Plat titled "A Portion of Sheet 1 of 3 Entitled Lot Line Shift, Lots 6 & 7, Block 1, Bigwood P.U.D. Subdivision Plats Filed with Blaine Co. Recorder, 10/8/87"
- ab. Protestant's Exhibit R - Water Right License No. 37-07745 in the name of Connecticut General Life Insurance Company
- ac. Protestant's Exhibit S - Water Right License No. 37-08203 in the name of Flowers Mill Subdivision Ass'n, Inc.
- ad. Protestant's Exhibit T - Warranty Deed from Melvin M. Melton and Lena M. Melton to Summit Corporation dated March 28, 1974
- ae. Protestant's Exhibit U - Camas Creek Subdivision plat
- af. Protestant's Exhibit V - Plat showing Flowers Mill Subdivision. (3 sheets)
- ag. Protestant's Exhibit W - Plat titled Lot Line Shift, Lots 6 & 7, Block 1, (3 sheets)
- ah. Protestant's Exhibit X - Heinz Property, plant materials list
- ai. Protestant's Exhibit Y - Application for Transfer of Water Right No. 4702 in the name of Dennis M. Baker
- aj. Protestant's Exhibit Z - Declaration of Protective Covenants and Restrictions, Camas Creek Subdivision
- ak. Protestant's Exhibit AA - U. S. Geological Survey Report 89-4018 titled "Water Resources of the Upper Big Wood River Basin, Idaho"
- al. Protestant's Exhibit AB - Phase I. Final Report titled "Hydrologic Evaluation of the Big Wood River and Silver Creek Watersheds" dated November 1994
- am. Protestant's Exhibit AC - Resume of David Parrish
- an. Protestant's Exhibit AD - OFFERED BUT NOT ADMITTED
- ao. Protestant's Exhibit AE - Water Right License No. 37-08258 in the name of the Idaho Water Resource Board

- ap. Protestant's Exhibit AF - Water Right License No. 37-07919 in the name of the Idaho Water Resource Board
- aq. Protestant's Exhibit AG - Water Right No. 37-08307 in the name of the Idaho Water Resource Board
- ar. Protestant's Exhibit AH - Idaho Department of Fish and Game - 1992 Job Performance Report, Project F-71-R-17
- as. Protestant's Exhibit AI - Memorandum dated June 25, 1992, from Bob Esselman to Fred Partridge
- at. Protestant's Exhibit AJ - Idaho Department of Fish and Game job announcement AN#92-00841-0206 OC for Environmental Staff Biologist
- au. Protestant's Exhibit AK - Order Adopting Proposed Memorandum Decision and Order, Order Issuing Proposed Memorandum Decision and Order, and Proposed Memorandum Decision and Order for License Nos. 37-08258 and 37-08307 in the name of the Idaho Water Resource Board
- av. Protestant's Exhibit AL - Amended Memorandum Decision and Order for License No. 37-07919 in the name of the Idaho Water Resource Board
- aw. Protestant's Exhibit AM - Memorandum Decision and Order for License No. 37-07849 in the name of the Idaho Water Resource Board
- ax. Protestant's Exhibit AN - Memorandum Decision and Order for License Nos. 37-07727 and 37-07728 in the name of the Idaho Water Resource Board
- ay. Protestant's Exhibit AO - Meeting Notice dated February 21, 1997, to the Water Policy Group from the Blaine County Commission
- az. Protestant's Exhibit AP - Deposition of Marti Bridges dated April 20, 1998

13. During the hearing, the hearing officer officially noticed the water right file for License No. 37-07745 and the following information:

- a. The Department's file for Application for Transfer Nos. 5174 and 5175 and previous transfer actions associated with License No. 37-07745

- b. Past decisions and orders of the Department as the decisions and orders may apply to the protested applications for transfer
- c. The Department's water right records, specifically including minimum stream flows established on the Big Wood River under License Nos. 37-07919, 37-08258 and 37-08307
- d. Reports, water measurements, and stream flow records in Department files, including U.S. Geological Survey reports
- e. Order of the Department dated June 28, 1991, which designated the Big Wood River Ground Water Management Area
- f. Well Driller Reports ("well logs") in Department files
- g. Watermaster delivery records for Water District 37
- h. Transfer No. 5143 in the name of Huf-N-Puf Trust
- i. Water right files and contents of the files for the following water rights and portions of water rights:
 - 37-07745 A, B, C, D, E, F, G and H
 - 37-08203
 - 37-30024
 - 37-30024 A, B, C, and D.
- j. Transfer Nos. 4702, 5086, 5143, and contents of the transfer files

14. The applicants' expert witness estimated the depletion of flows in the Big Wood River which he believed would occur if either transfer is granted for the irrigation of 5 acres in the Big Wood River drainage, as proposed in each of the applications, based on a number of assumptions. Using a "Wright-Penman FAO Blaney-Criddle" analytical approach, the applicants' expert witness estimated that a peak consumptive use of 0.04 cfs during the summer would occur under either transfer, assuming irrigation was limited to vegetation having low water consumption requirements. Based on one or more unstated assumptions, the applicants' expert witness estimated that 50 percent of the peak consumptive use may not result in a depletion to the flow in the Big Wood River at Hailey, Idaho. Thus the applicants' expert witness estimated that the maximum, instantaneous depletion to flow in the Big Wood River at Hailey under each transfer would be 0.02 cfs. The applicants' expert witness characterized this depletion in flow as small, difficult to measure, but "real."

15. The expert witness for the protestants testified that pumping wells on the two parcels for the irrigation of 10 acres as proposed in the two applications for transfer would affect or reduce flows in the Big Wood River. He described the amount of depletion that would occur if the transfers are approved as proposed in the applications as a "real depletion" but "minor." Using a different method than the applicants' expert witness, the expert witness for the protestants calculated the depletion in flows of the Big Wood River, expressed as a percentage of water diverted, that would occur from pumping wells in the aquifer adjacent to the river north of Ketchum, Idaho, for a range of aquifer transmissivity values, point of diversion distances from the river, and pumping durations. The expert witness for the protestants testified that for transmissivity values ranging from 10,000 ft²/day to 40,000 ft²/day and for pumping durations ranging from 10 days to 210 days, the amount of water taken from the Big Wood River as a result of pumping wells in the adjacent aquifer would range from 77 percent to 99 percent of the amount of water pumped, as set forth in Protestants' Exhibit P. Even if the depletion to the Big Wood River is limited to the 0.04 cfs consumptive use for each of the proposed transfers estimated by the applicants' expert witness, the resulting depletions to the Big Wood River based on the analysis of the protestants' expert witness would be approximately one-and-one-half to two times as large as the depletions estimated by the applicants' expert witness.

16. The proposed new points of diversion under the applications for transfer are located in close proximity to the Big Wood River. The parcel of land associated with Application for Transfer No. 5174 is adjacent to the river, and the land associated with Application for Transfer No. 5175 is as close as approximately 50 yards to the river.

17. The expert witness for the applicants testified that the reach of the Big Wood River adjacent to the proposed points of diversion and places of use is a losing reach, and the expert witness for the protestants did not disagree with this testimony. Additionally, the applicants' expert witness testified that the aquifer adjacent to this reach of the Big Wood River was hydraulically connected to the river. During a portion of the hearing on April 8, 1998, the expert witness for the applicants testified that either transfer would cause a maximum, instantaneous depletion in the flows of the Big Wood River estimated to be 0.02 cfs at Hailey, Idaho, as previously described in Finding of Fact No. 14. Withdrawal of water from the aquifer adjacent to the Big Wood River would not cause a depletion in the flows of the Big Wood River unless the river and the adjacent aquifer are hydraulically connected. The expert witness for the protestants also testified that the aquifer adjacent to the Big Wood River near the point of diversion proposed by Huf-N-Puf Trust is hydraulically connected to the river. He testified that the proposed transfers would reduce flows in the Big Wood River whether or not this reach of the river is a losing reach.

18. The consumptive irrigation requirement for the most water-consumptive vegetation near Ketchum, Idaho, as reported by R. G. Allen and C. E. Brockway in a technical report titled "Estimating Consumptive Irrigation Requirements for Crops in Idaho", dated August 1983, is approximately 2.5 acre-feet/year/acre, and for 10 acres would equal 25 acre-feet annually.

19. Protestant Blaine County provided extensive testimony describing the development and intended use of its "Local Public Interest Water Policy," adopted as a resolution of the county on January 26, 1998, and describing the inconsistency between the proposed transfers and its policy. Blaine County's "Local Public Interest Water Policy" describes a part of the local public interest as defined in Section 42-203A(5), but it does not constitute the whole description of the local public interest for the proposed transfers.

20. On June 28, 1991, the Department issued an order designating the Big Wood River Ground Water Management Area ("BWRGWMA") together with a Management Policy providing for increased management of the designated area. Among other findings, the order provided the following:

The surface and ground waters of the Big Wood River drainage are interconnected. Diversion of ground water from wells can deplete the surface water flow in streams and rivers. New ground water uses can also deplete available supplies for other users and affect basin underflow which presently accumulates in the Magic Reservoir.

21. The Management Policy for the BWRGWMA provides in pertinent part as follows:

Most consumptive use applications will be denied unless the applicants can demonstrate there will be no injury or can provide acceptable mitigation to prior rights.

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. . . Applications for amendment or applications for transfer which propose a change in the point of diversion from outside the ground water management area to within the area which would directly or indirectly result in the irrigation of new land will be treated as a proposed new appropriation of water.

22. Groundwater in the Camas Creek drainage from which the applicants seek to move part of License No. 37-07745 does not contribute water to the upper reaches of the Big Wood River drainage where the applicants seek to divert water as proposed in their applications.

23. The Big Wood River and Camas Creek are within Water District 37 where water deliveries are administered during times of water shortage by an elected watermaster.

24. The water delivery records of Water District 37 show that deliveries to water rights on the Big Wood River above Magic Reservoir were curtailed at times each year during the 1970 to 1996 period (27 years) due to insufficient flows in the river to supply all water rights. The records show that deliveries to surface water rights having priorities as early as May 1, 1883, were curtailed for part of the irrigation season on April 1, 1994, and again on June 7, 1994, and that water rights having priorities of August 1, 1902, or later in time have been curtailed for a portion of every year during the 1970 to 1996 period.

25. The wells from which groundwater is proposed to be diverted would be located proximate to the Big Wood River and would divert groundwater from an aquifer immediately adjoining and hydraulically connected to the Big Wood River. The landscape irrigation uses proposed at the new places of use using new points of diversion require a reliable water supply during the irrigation season.

26. Based on the watermaster records of water deliveries in Water District 37 for the years 1992 through 1996, Protestants' Exhibit K shows that the transferred water rights would have been curtailed for most, if not all, of the remaining irrigation season beginning on April 1, July 14, May 12, August 3, and July 5, respectively. Similarly, the transferred water rights would have been curtailed at some time between April 1 to November 1 during every other year of the 1970 to 1996 period. Therefore, the water available would not constitute a reliable supply for the intended use of landscape irrigation during substantial portions of the April 1 to November 1 time period.

27. There is insufficient water available at the proposed points of diversion to satisfy the intended use of landscape irrigation, as proposed in the applications for transfer, during substantial portions of the April 1 to November 1 time period without causing injury to other existing water rights.

28. The local public interest requires the protection of existing water rights including water rights numbered 37-07919, 37-08258, and 37-08307 issued to the Idaho Water Resource Board for minimum stream flow purposes. Any new diversions which reduce the supply of water available to maintain existing water rights in the Big Wood River, including minimum stream flow rights, would constitute an injury to the existing water rights and would be contrary to the local public interest.

ANALYSIS

The applicants attempted to show that injury would not occur or would be of little or no consequence. The applicants presented three general concepts to support their positions.

First, the depletions that would occur would be insignificant in comparison to the average or mean annual flow of the Big Wood River and would be so small that measurement of the depletions would be difficult, if not impossible.

Second, any call for delivery on the applicants' water by the holder of a senior water right during times of water shortage in the Big Wood River would be a "futile call." Therefore, curtailment of the applicants' diversions would not benefit senior water right holders within a reasonable time of the call.

Third, since the Department issued an order in December 1991 in connection with License No. 37-08307 for a minimum stream flow that changed the authorized rate from 119.23 cfs to 119 cfs, any reduction in the flow of the Big Wood River that would result from the transfers as proposed and would be less than 0.23 cfs would be of no consequence and would not constitute injury.

Although the expert witnesses did not agree on the magnitude of the effect the transfers would have on flows in the Big Wood River, evidence and testimony indicate that groundwater and surface water near the points of diversion proposed in the applications for transfer are interconnected and directly respond to changes in one or the other. The expert witness for the applicants estimated a maximum, instantaneous depletion of 0.02 cfs in the flow of the Big Wood River would occur under each transfer if the applications for transfer are approved and used as to irrigate vegetation having low water consumption requirements. The testimony of the expert witness for the protestants indicated that the depletions resulting from the irrigation of vegetation having low water consumption requirements could be at least one-and-one-half to two times more than the depletions estimated by the applicants' expert witness. The applicants argue that under either estimate of depletion, the rate of depletion cannot be measured and has no significance when compared to the average rate of flow of the river or to the minimum stream flow water rights held by the Idaho Water Resource Board. Even if so, while the depletion in flow of the river would be very small on an instantaneous basis, it is nonetheless real and determinable. If the projected depletions are allowed to occur at a time when flows in the river are insufficient to supply water to all existing water rights, injury, although small, will occur.

Furthermore, although the applicants' expert witness testified that water under the proposed transfers would be used to irrigate landscape vegetation having low water consumption requirements, the water rights could not be limited for use in irrigating vegetation having low water consumption requirements. The two applications for transfer, when combined, propose to divert a maximum volume of water of 35 acre-feet annually. This volume of water is theoretically sufficient for irrigating vegetation having high water consumption requirements near Ketchum, Idaho. If the two applications for transfer are approved as submitted, the annual volume of water depleted from the Big Wood River could total nearly 25 acre-feet. This volume of water is not insignificant.

The depletion and resulting injury are real and can be determined. The watermaster's records for the past 27 years clearly show that water rights with priority dates later in time than the priority date for the water right sought to be transferred by the applicants are curtailed for all or part of the irrigation season in each and every year. The applications, if approved, would have the same effect on other water rights from the Big Wood River as approving an additional (new) appropriation of water and would reduce water availability during times of scarcity. Approving the transfers and allowing groundwater to be pumped under a junior priority from an adjacent aquifer hydraulically connected to the Big Wood River during times when downstream water rights from the Big Wood River are curtailed, many of which have senior priority dates, would cause real and actual injury and would be wholly inconsistent with Idaho law.

CONCLUSIONS OF LAW

1. Section 42-222, Idaho Code, provides in pertinent part as follows:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, and the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-203A(5), Idaho Code;

2. The Applicants carry the burden of coming forward with evidence that the proposed change will not injure other water right holders, that it will not constitute an enlargement of the use, and will be consistent with principles of conservation of the water of the state of Idaho.

3. The applicants, protestant, and intervenors have the responsibility of coming forward with evidence regarding matters of the local public interest of which they are each most cognizant.

4. The applicants have the ultimate burden of persuasion for all of the criteria of Section 42-222, Idaho Code.

5. Groundwater and surface water in the Big Wood River drainage above Magic Reservoir are interconnected such that a depletion of one directly affects the other.

6. In each of the irrigation seasons during the years 1970 through 1996, the watermaster of Water District 37 has curtailed the use of water rights having priority dates of August 1, 1902, and later on the Big Wood River upstream from Magic Reservoir due to insufficient flows in the river to supply all the water rights of record. The water rights that are curtailed, although junior in priority to other rights still receiving water, are senior in priority to the rights sought for transfer under the applications in this matter.

7. Approval of the applications will cause injury to other water rights on the Big Wood River upstream from Magic Reservoir because the transferred water rights can not provide for the irrigation intended by the transfers without out-of-priority diversions for which mitigation has not been proposed.

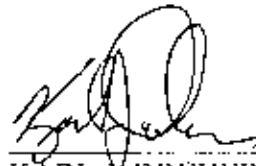
8. Approval of the applications for transfer allowing diversion and use of groundwater as proposed would cause the same injury to water rights having senior priority dates upstream from Magic Reservoir as would a new appropriation of water in the same amount from the surface water or groundwater at the locations proposed in the applications.

9. Approval of the applications for transfer would not be in the local public interest.
10. The Department should deny the applications.

ORDER

IT IS THEREFORE, hereby ORDERED that Application for Transfer No. 5174 in the name of Dennis M. Baker, and Application for Transfer No. 5175 in the name of Huf-N-Puf Trust are **DENIED**.

Dated this 25th day of November, 1998.



KARL J. DREHER
Director